SUPREME COURT, U.S.
FILED
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No. 01-1289

IN THE

# Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

*Petitioner*,

v.

CURTIS B. CAMPBELL AND INEZ PREECE CAMPBELL,

*Respondents*.

**On Writ Of Certiorari To The Utah Supreme Court**

## BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1/]

### INTEREST OF THE *AMICUS CURIAE*

The American Council of Life Insurers ("ACLI"), a non-profit trade association, is the largest trade association in the United States representing the life insurance industry. The ACLI's members include the 399 legal reserve life insurers, accounting for 76 percent of life insurance premiums in the United States. ACLI advocates the interests of its members before federal and state legislators, state insurance departments, federal regulatory agencies, and the courts. It files this brief *amicus curiae* out of its grave concern that the nationwide, decade-spanning "institutional case" approach endorsed by the Utah Supreme Court will expose its members to arbitrary, massive, and repetitive punitive damages awards.

### INTRODUCTION AND SUMMARY OF ARGUMENT

Our system of justice and faith in the jury system "is founded on longstanding tradition reflected in constitutional text."[2/] Thus we assume that the jury in this case was competent to decide whether petitioner acted in bad faith in taking respondents' case to trial, and to make an award of punitive damages upon deciding that petitioner's conduct towards respondents was particularly reprehensible.

The Utah Supreme Court, however, has permitted the jury to punish petitioner for a wide variety of acts having no realistic relation in time, place, or character to the case at bar. The jury obviously meant to punish petitioner not simply for its conduct

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1/ The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the *amicus curiae* provided any monetary contribution to its preparation or submission.

2/ *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 473 (1993) (O'Connor, J., dissenting).

in this case as respondents' insurer, but also for its marketplace conduct generally toward other persons across the country over the last twenty years. Thus the jury in effect assumed the role of nationwide insurance regulator after a crash course in insurance law taught in the courtroom by adversarial experts indifferent to the public interest.

We believe that it is beyond the institutional competence of a jury in a single tort action to make a reliable assessment of the propriety of an insurance company's nationwide activities spanning two decades. Hence the risk is great that a jury will reach an arbitrary result when it is asked to act as a national regulator imposing punishment not limited to the case before it and unrelated to the harm suffered by the plaintiff actually before the court.

We are supported in this view by a comparison of the means whereby the individual states, in their role as insurance regulators, test the behavior of insurance companies doing business within their borders. We describe below, in some detail, the single-state and multi-state "market conduct examinations" and other reviews the states regularly conduct. These rigorous examinations cover all aspects of the insurer's business, and in particular its policyholder service, complaint handling, and claims handling. They typically take at least six months to complete. And they are led by Certified Insurance Examiners who have had years of experience and are steeped in knowledge of the insurance industry.

A single tort trial cannot duplicate the features of the regulatory market conduct exam that conduce to its reliability. Jurors are laypersons, certainly not experts in the industry, and cannot be sufficiently educated during the course of a single trial by adversarial expert testimony to gain the sophistication required to make a reliable judgment about whether a company deserves to be sanctioned for historical conduct outside the case before it, let alone the size of the appropriate sanction, if any. The ever-present risk that a jury will act capriciously "is



especially [great] in the area of punitive damages,"[3/] and that risk is unacceptably multiplied when the jury is asked to make judgments about decades of corporate conduct far removed in place and time from the facts of the single case before it.

This case is exemplary: the jury's huge punitive damages verdict, reached after three and a half hours of deliberation, is starkly contrary to other, more reliable indicia of petitioner's performance and behavior, which (as we show below) uniformly place petitioner at the highest ranks of insurance companies in terms of fair treatment of policyholders and customer satisfaction.

We do not say that a jury may not in a certain sense "regulate" an insurance company defendant in the case before it by an award of punitive damages within traditional ratios to deter and punish the misconduct aimed at the plaintiff in the case at hand. Tradition and constitutional text permit that result. But when a jury is asked to decide a decades-long "institutional" case against an insurance company, it is so likely to get it wrong, and the consequences of its decision may so far exceed its role of deciding a particular dispute, that an award of punitive damages should be presumed to be capricious and unfair.

The decision of the Utah Supreme Court rests on the invalid premise that the jury was capable of reliably assessing and punishing petitioner's "way of doing business for the last twenty years." Pet. App. 34a. That error led the Utah court to misapply the guideposts laid down in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), for petitioner could not possibly have been on notice that a jury would be deemed competent to review its historic business practices and on that basis punish it for a bad faith refusal to settle a single excess verdict case (in which it paid the excess judgment in full) with a punitive damages award of $145,000,000.

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3/ *TXO Prod. Corp.*, 509 U.S. at 474 (O'Connor, J., dissenting).

## ARGUMENT

### The Jury Is Institutionally Incompetent As A Nationwide Insurance Regulator

**1.** The $145,000,000 punitive damages award in this case is shocking for many reasons. It rests on the irrational underlying theory that, as part of a company-wide scheme to defraud its policyholders, petitioner would insist in bad faith on trying a case it was bound to lose.[4/] It is irreconcilable with the undisputed fact that petitioner's record in third party claim cases was and is spectacularly good.[5/] It punishes petitioner for its "way of doing business"[6/] over a twenty-year period across the Nation, with persons other than respondents, and in kinds of cases having nothing in common with this one. The punishable deeds included acts indisputably lawful where they occurred, acts committed by different companies, and acts having no similarity to the ones in this case except under the artificial construct that they were all supposedly part of a scheme that, in the end, included virtually anything petitioner did in an effort to be profitable.

Petitioner and other *amici* will make the foregoing points in greater detail. Our focus is the use of a jury, through its punitive damages power in a single tort case, as a regulator of an insurance company's conduct in the marketplace over a span of years. We believe that the Utah Supreme Court erred in

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4/ See Pet. App. 6a (respondents "introduced evidence that [petitioner's] decision to take the case to trial was a result of a national scheme to meet corporate fiscal goals by capping payouts on claims company wide").

5/ Respondent's case was the only one of over 29,000 third party claim cases handled by petitioner in Utah between 1980 and 1994 in which an insured was exposed even temporarily to the possibility of execution on an excess judgment. R. 10283:139-140; R. 10285:172-74, 181-85.

6/ Pet. App. 34a.



assuming that a jury is competent to weigh and punish petitioner not simply for its harm to respondents but also for "the harmful effect on the larger community of all those who deal with" petitioner,[7/] and that that error led to its misapplication of the guideposts announced in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996).

**2.** The eight person jury in this case, none of them (so far as appears) coming into the courtroom with any knowledge about the insurance industry, was told by respondent's counsel in opening argument that they were about to hear about petitioner's "nationwide practice" and were "going to be evaluating and assessing, and hopefully requiring [petitioner] to stand accountable for what it's doing across the country, which is the purpose of punitive damages." R. 10258: 170, 171.

What then followed was a farrago of anecdotes about petitioner's supposedly fraudulent behavior in all walks of its business life and in all parts of the country for the past twenty years, buttressed by the testimony of respondents' experts who found proof of a sinister scheme in every corporate expression of concern about cost control and who repeatedly opined expansively about "fraudulent practices by [petitioner] in its nation-wide operations."[8/]

Respondents' experts testified about, among other things, first-party property claims and verdicts in first party cases; assertions in class actions brought (but not proved) against petitioner; acts by a non-party sister company; petitioner's litigation tactics in other cases; petitioner's encouragement of

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7/ Pet. App. 21a; see also *id.* ("The harm is minor to the individual but massive in the aggregate."); *id.* at 43a (petitioner's "wide-spread corporate scheme to defraud its insureds * * * had far-reaching negative effects on both its insureds and society in general.").

8/ Pet. App. 6a. The Utah Supreme Court sought to sanitize those opinions by ruling that they did not touch on "legal standards or rules of law," which would have been beyond the witnesses' expertise. *Id.* at 48a.

first-contact settlements; petitioner's use of non-OEM (original equipment manufacturer) parts; and the alleged effects of petitioner's supposedly fraudulent conduct on the insurance industry as a whole. See Pet. App. 37a & n.13, 38a-40a, 44a-45a.

Along the way the jury was told that petitioner's claims handling practices were a great source of profit, that petitioner's surplus had grown over the years, and that the growth was the direct result of the fraud. In fact petitioner's claim handling practices resulted in huge losses during the relevant period,[9/] but the important point for present purposes is that the jurors in all likelihood did not even understand the concept of an insurance company's surplus in relation to corporate profits.[10/]

In closing argument, respondents' counsel said to the jury: "The only regulators of insurance companies are juries like you."[11/] As the Court knows, however, the states carefully regulate insurance companies operating within their borders. They "have an important interest in maintaining precise and detailed regulatory schemes for the insurance industry."[12/] Accordingly, we describe below the process by which states

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9/ Ex. 57(1)-P, Tabs 3&6; see also R. 10270:163-64; R. 10273:190-93

10/ The Utah Supreme Court itself seriously misunderstood that concept. See Brief *Amici Curiae*, filed herein, of Truck Insurance Exchange and USAA.

11/ R. 10324:78.

12/ *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 733 (1996) (Kennedy, J., concurring); see also *Blue Cross & Blue Shield* v. *Baerwaldt*, 726 F.2d 296, 299-300 (6th Cir. 1984) ("[T]he regulation of insurers implicates vital state interests."); *Bleecker* v. *Standard Fire Ins. Co.*, 130 F. Supp. 2d 726, 736 (E.D.N.C. 2000) ("States have a substantial interest in ensuring that the relationship between the insurer and the insured is conducted in a proper manner."); *Fireman's Fund Ins. Co.* v. *Schuster Films, Inc.*, 811 F. Supp. 978, 984 (S.D.N.Y. 1993) (a state has an interest "in regulating insurers doing business within its borders").



exercise their regulatory powers to assure themselves that they are fully acquainted with an insurance company's "corporate policies and practices." Pet. App. 38a. We do so not to urge simply that juries are unnecessarily redundant as nationwide regulators of insurance companies, but to emphasize their incompetency in that role by comparing the way it is done by professional insurance regulators.

**3.** To ensure that oversight produces accurate results and is fair to insurers, states assign qualified reviewers to examine insurers according to established and rigorous procedures. The examinations themselves take various forms, including market conduct examinations, producer licensing, policy form approval, rate regulation, compliance activities, consumer education, cost containment, and consumer complaint processing. See 1 *Market Conduct Examiners Handbook* (National Association of Insurance Commissioners 2002).[13/]

Almost every state (including Utah, see Utah Code Ann. § 31A-2-203(2), (4)) undertakes market conduct examinations "to identify and correct insurer operating practices that are in conflict with contract provisions, state laws, rules, regulations or orders of the commissioner." 1 *Market Conduct Examiners Handbook* at 5. Market conduct examinations themselves come in different forms. See, *e.g.*, Minn. Stat. § 60A.129 (identifying three types of market conduct examinations, including "compliance examinations," "targeted examinations," and "comprehensive examinations"). States conduct the exams on a scheduled basis every few years, or on an as-needed basis.[14/]

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13/ The National Association of Insurance Commissioners ("NAIC") is comprised of insurance regulators from every state, and drafts model acts and insurance regulations for voluntary adoption by each state. See NAIC: General Information, *at* http://www.naic.org/1misc/aboutnaic/ about/about01.htm (visited Aug. 14, 2002).

14/ *Compare* Conn. Gen. Stat. § 38a-15(a) (commissioner to conduct market conduct examination "as often as he deems it expedient"), and Fla. Stat. ch. 624.3161 (department to conduct market conduct examinations "as it deems necessary") *with* Mass. Ann. Laws ch. 175, § 4(2) (requiring comprehensive examination of each insurer at least

The typical market conduct examination focuses on "(1) company operations/ management, (2) complaint handling, (3) marketing and sales, (4) producer licensing, (5) policyholder service, (6) underwriting, and (7) claims." 1 *Market Conduct Examiners Handbook* at 4.

State procedures for market conduct exams may differ, although many states require their insurance departments to conduct the examinations according to the NAIC's model procedures.[15/] Under those procedures, the state first identifies the aspects of the insurer's operations to be examined. Second, to further identify the areas of the insurer's operations that require special emphasis, and to estimate the time required to complete the exam, the examiners gather information from prior examinations, communicate with other insurance department personnel, interview the insurer, and review reports from other states' examinations of the insurer. Third, the examiners notify the company of the upcoming exam, typically at least 60 days in advance.

Fourth, the examiners develop a book of examination materials, including general instructions for conducting the exam, a description of the scope of the exam, time and cost estimates, and instructions for the sampling techniques to be used to evaluate the insurer's operations. Fifth, the examiners follow particular exam procedures, including holding a pre-examination conference, exchanging information with the insurer, establishing procedures for handling the insurers' documents, and meeting with the insurer when the exam is complete.

Finally, the examiners draft an examination report, provide the insurer with the opportunity to respond to the draft, and prepare a final report. The state then uses the report to

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every five years), and N.M. Stat. Ann. § 59A-4-5(A) (same), and Utah Code Ann. § 31A-2-203(2), (4) (same).

15/ *E.g.*, Mass. Ann. Laws. ch. 175, § 4(3) (market conduct examinations must comply with NAIC Market Conduct Examiners Handbook); Vt. Stat. Ann. tit. 8, § 3573(a) (same).



determine the existence and extent of any noncompliance, to determine whether to sanction the insurer, and to fix the extent of those sanctions. See 1 *Market Conduct Examiners Handbook* chs. I, IV-VI; see also NAIC, "Market Conduct Examination Resources," draft, *at* http://www.naic.org/1consumer_protection/ rgwg_a_docs/minres5.pdf (visited Aug. 8, 2002).

From start to finish, the model market conduct examination normally takes at least two-hundred and ten days (and can be longer if the insurer requests a formal hearing on the final report). See *id*.

In addition to performing single-state examinations, states also cooperate in various respects to perform sometimes narrow but often comprehensive common examinations of insurers, frequently referred to as multi-state examinations.[16/] These exams feature joint planning (sometimes designating one state to lead the examination), notice to the company, and pre-examination, examination, and post-examination procedures similar to those used for single state exams. See 1 *Market Conduct Examiners Handbook* ch. VII.[17/]

Under the NAIC model procedures, all of these exams are conducted by a hierarchy of trained and certified junior and senior reviewers, each of whom participates in various aspects of the review. "Insurance examiners" have completed at least two of the eight courses required to attain the Insurance Regulatory Examiners Society's (IRES) designation of Accredited Insurance Examiner (AIE), which is awarded only to individuals who have two or more years of full-time regulatory experience and are "extensively trained in either of the two

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16/ States also sometimes rely on each other's examinations. See, *e.g.*, Utah Code Ann. § 31A-2-203(4); Utah Admin. Code R590-150-3.

17/ A multi-state market conduct exam of State Farm's handling of automobile injury claims is ongoing. See Daniel Hays, "State Farm Probe Into Second Stage, Regulators Say," *Nat'l Underwriter*, Apr. 23, 2001, at 2.

primary fields of insurance regulation, property & casualty or life & health" by taking "at least eight professional development courses in the selected curriculum." "Senior examiners" are certified as an AIE or as a Certified Insurance Examiner ("CIE"), which is awarded to an individual who has "attained the AIE in one field and then cross-trains in the other field by taking four additional courses."

At the top are "examiners-in-charge" and "administrative examiners," who are certified as CIE's and are responsible for scheduling and managing examinations. See 1 *Market Conduct Examiners Handbook* ch. II; see also "Market Conduct Examination Resources," draft, *at* http://www.naic.org/1consumer_protection/rgwg_a_docs/minres5.pdf (visited Aug. 8, 2002).

The NAIC further recommends that state insurance departments review consumer complaints quarterly or monthly, to allow the department to "create an effective and immediate surveillance program in detecting problem areas on an industry-wide level and in isolating potential problems for an individual company." 2 *Market Conduct Examiners Handbook* (National Association of Insurance Commissioners 2002) at A-14.[18/]

What the foregoing shows, in short, is that in discharging their responsibilities as regulators of the insurance industry the states utilize highly trained personnel to examine insurers' operations according to rigorous and often lengthy procedures which are designed to produce accurate assessments of insurers' behavior while treating the insurers fairly throughout the process.

**4.** A single tort trial cannot reproduce any of the features of the market conduct exam that make it reliable. It may be reasonable, and in any event unavoidable, to ask lay jurors to make a reliable decision about alleged insurer misconduct aimed

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18/ Those procedures are supplemented by recommended review checklists and forms, and timelines in which various aspects of the review should be completed. 2 *Market Conduct Examiners Handbook* at A-16–A-21.



at the plaintiff in the one case before it. It is asking too much to expect them to become sufficiently educated by adversarial expert testimony during the course of that one trial to make reliable judgments about decades of insurance practices across the Nation in unrelated matters involving other persons not before the court.

The case at bar is a case in point: the jury's punitive damages verdict – reached after three and a half hours of deliberation[19/] – appears to reflect an acceptance of respondents' characterizations of petitioner as a recidivist defrauder of its policyholders. Notably, however, no market conduct exam by any state has ever reached any such conclusion, and in fact the more reliable measures of petitioner's conduct show it to be among the best in the country in terms of fair treatment of insureds and customer satisfaction.

"Complaint ratios" measure the number of complaints received by the regulators as a function of policies in place and reveal trends and identify areas where enforcement or regulatory action may be needed. "[S]tate insurance department[s] can compare [complaint] ratios to determine what companies lie outside the average in a given year and to compare an individual insurer's ratio with the previous year." NAIC, *A Guide to Market Conduct Analysis*, at 4, *at* http://www.naic.org/1consumer_protection/documents/tradecom1.pdf (visited Aug. 14, 2002). Petitioner's complaint ratios are far better than the national median.[20/]

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19/ R. 10234: 227, 237.

20/ See NAIC, *Closed Consumer Complaints: Complaint Ratio Report*, *at* http://www.naic.org/servlet/cis.IndexMain (visited Aug. 6, 2002). In addition, Richard Rogers, an insurance examiner for the State of Illinois, testified at trial that petitioner's low complaint ratios in the State placed it 5th, 3rd, and 2nd, respectively in 1980, 1986, and 1994, from the top in a group of the 60-some companies that write 93-94% of the premiums in Illinois. V. 24, 27:6–41:2. Richard Reynolds, a board member of the Texas insurance department and a member of NAIC, testified that in Texas petitioner ranked 3rd out of 20 in 1991 and 5th out of 20 in 1994, and ranked well above average in California,

In addition, data is collected about insurers by independent companies whose reports help educate consumers about an insurer's operations. These reviews also put petitioner at the top of the class, rating it "[a]mong the best" auto insurer for "Overall Experience";[21/] noting it had the third-best overall customer satisfaction for auto insurers, well above the industry average;[22/] and that it had the third-fewest complaints per premiums of nine major auto insurers.[23/]

These assessments of petitioner's conduct are made on the basis of hard facts assessed dispassionately in the marketplace by persons familiar with the insurance industry as a whole. They show that, across the country, petitioner's customer satisfaction ratings are consistently among the best in the industry. Yet the Utah Supreme Court has ruled that, in a single case, eight lay persons exposed to adversarial expert testimony over a 9-week period are competent to reach a completely contrary view of petitioner's historic conduct, and to enforce that view with a $145,000,000 sanction.

**5.** We recognize that arguments about capricious results from jurors in over their heads tend to prove too much insofar as they impugn jury competence generally. Our legal traditions and the Seventh Amendment, reflecting "sound considerations of

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Florida, and New York. V. 25, 86:12-96:10. Harold Yancey, the insurance commissioner for Utah from 1985 to 1993, testified that for the 5 preceding years petitioner's low complaint ratios placed it "in the lower 25 percent of all companies." V. 25, 188.

21/ See, *e.g.*, J.D. Power Consumer Center, *at* http://www.jdpower.com/auto/insuranceratings (visited Aug. 14, 2002).

22/ J.D. Power Consumer Center, *at* http://www.jdpower.com/global/jdpaawards/releases/091800au.asp (visited Aug. 7, 2002).

23/ *How the Biggest Insurers Rate*, Kiplinger, June 1999, at 8, *at* http://kiplinger.com// magazine/ archives/1999/June/insurance8.htm (visited Aug. 14, 2002).



justice and democratic theory,"[24/] foreclose an attack on the jury's institutional capacity to regulate corporate behavior through an award of punitive damages to deter and punish the misconduct aimed at the plaintiff in the case at hand. Moreover, as a practical matter, in considering just the single case before it, where the inquiry is more manageable, the jury is more likely to be able to become sufficiently informed to reach a correct result, and the consequences of jury error in deciding a single case are less likely to be catastrophic.

But it impermissibly magnifies the jury's power to entrust it to decide a decades-long, nationwide "institutional" case, and to subject defendants whose conduct in other states has been regulated and approved by the appropriate state authorities to massive punitive damages predicated in large part on that same conduct. Accordingly, when a jury acts in the role of national insurance regulator, the risk that it will get it wrong is so great, and the consequences of its decision are so incommensurate with its role of deciding the particular dispute before it, that courts should treat punitive damages awards in such cases as presumptively capricious and unfair.

It follows that the Utah Supreme Court erred in assuming that the jury was competent to assess petitioner's "way of doing business for the last twenty years" and to punish petitioner for "the harmful effect on the larger community of all those who deal with the company." Pet. App. 34a, 21a. That error led the Utah court to misapply the *BMW* v. *Gore* guideposts, for if it had presumed the jury incapable of assessing petitioner's historic business practices in cases not before it, it could not possibly have determined that "this case contains exceptional facts and circumstances" on which the jury could properly rely in making its award. Pet. App. 34a. Put more directly in due process terms, petitioner could not have been on notice that a jury would be deemed competent to review twenty years of its nationwide conduct and on that basis punish it for a bad faith refusal to settle a single case – in which it paid the resulting excess judgment in full – with a punitive damages award of $145,000,000.

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24/ *TXO Prod. Corp.*, 509 U.S. at 473 (O'Connor, J., dissenting).

**6.** There are several ways in which the jury could be confined to its proper role of deciding liability facts and an appropriate punishment warranted for the defendant's conduct towards the plaintiff in the case before it. In the federal courts the evidence admissible on the subject of punitive damages may be effectively limited through a sensible application of Rules 403 and 404 of the Federal Rules of Evidence. A similar restriction on admissibility in state courts based on due process considerations would serve the same purpose and have the salutary effect of eliminating controversy over whether a jury permissibly considered other evidence of other acts in weighing reprehensibility or impermissibly punished the defendant for lawful conduct not before it.

A simpler approach, and one possibly less in tension with the Court's pronouncement on the broad scope of the punitive inquiry, would be to require strict adherence to traditional ratios of punitive to compensatory awards. That approach would assure that, even in cases where the jury was asked to act as nationwide regulator of historical corporate conduct, the award could not exceed the ceiling that might legitimately be awarded to deter and punish the conduct actually at issue in the case at hand. And of course awards even at that ceiling would be likely candidates for remittitur or reversal under the other *BMW* v. *Gore* guideposts in cases where the jury is found to have exceeded its proper role.



## CONCLUSION

The judgment of the Utah Supreme Court should be reversed.

Respectfully submitted,

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